UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. **CASE NUMBER: 8:03-CR-77-T-30TBM**

HATEM NAJI FARIZ
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DEFENDANT HATEM NAJI FARIZ'S MOTION IN LIMINE TO PRECLUDE THE ADMISSION OF EVIDENCE OF CERTAIN OVERT ACTS SINCE THEY CANNOT FORM THE BASIS FOR CONVICTION UNDER COUNTS ONE AND TWO OF THE SUPERSEDING INDICTMENT, REQUEST FOR A HEARING, AND MEMORANDUM OF LAW IN SUPPORT

Defendant, HATEM NAJI FARIZ, by and through undersigned counsel, pursuant to Federal Rules of Evidence 401, 402, 403, and international law, respectfully moves this Court to preclude the admission into evidence of certain Overt Acts since they cannot form the basis for conviction under Counts One and Two of the Superseding Indictment. Because of the complexity and importance of these issues, Mr. Fariz requests a pretrial hearing under Local Rule 3.01(d). As grounds in support, Mr. Fariz states:

I. Introduction

Seventeen of the 324 Overt Acts alleged in Paragraph 43 of the Superseding Indictment refer to armed attacks allegedly carried out by the Palestinian Islamic Jihad ("PIJ") over the course of over 20 years. Count One of the Superseding Indictment "multiple acts involving murder, in violation of Florida Statutes 782.02; 777.04(3)" and conspiracy to murder under 18 U.S.C. § 956 as predicate offenses of a RICO conspiracy under 18 U.S.C. § 1962(d). (Doc. 636 at 9-10). Count Two alleges the existence of a

conspiracy by the defendants to murder, maim, or injure persons abroad in violation of 18 U.S.C. § 956(a).

Of the attacks charged in the Superseding Indictment, four alleged PIJ attacks, namely Overt Acts 17, 124, 131, and 321, involve operations against military targets in militarily-occupied territory in which only soldiers or armed settlers were killed or injured. Attacks on soldiers of an occupying army in militarily occupied territory cannot constitute "murder" as defined by federal criminal law in the United States or by state law in Florida, because international law recognizes the right of an occupied people to resist, via armed struggle, military occupation. Since these attacks cannot constitute "murder," they cannot serve as the basis for a conviction under Counts One or Two of the Superseding Indictment. Mr. Fariz hereby requests that the Court strike any reference out of the Superseding Indictment to and preclude evidence concerning the Overt Acts enumerated above. Alternatively, Mr. Fariz requests that the Court instruct the jury that those Overt Acts cannot serve as a basis for conviction under Counts One and Two.

II. Argument

A. International Law

1. Overview

The Overt Acts that are the subject of this motion all concern incidents overseas involving individuals who are not nationals of the United States. Ordinarily, for the United States to exercise jurisdiction over acts taking place outside its borders, those acts must have a substantial effect within its territory, affect its nationals, or involve conduct

by non-nationals that impacts upon "the security of the state or a limited class of state interests." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987). Even within those parameters, the United States may not prescribe certain activity if "the exercise of jurisdiction is unreasonable." *Id.* at § 403. However, even if there is no basis for jurisdiction under § 402, the United States may prosecute individuals for violations of law "for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism." *Id.* at § 404. The Superseding Indictment does not contain any allegations that Mr. Fariz or any of the other Defendants before the Court played any role in planning or carrying out any of the alleged attacks. Prosecution for certain allegations which involve the killing by non-U.S. citizens of foreign soldiers in a conflict that takes place outside the borders of the United States in militarily-occupied territory constitutes an unreasonable exercise of jurisdiction. Further, the Overt Acts that are the subject of this motion are not "of universal concern" and cannot give rise to jurisdiction on that basis.[1]

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[1]While there is no internationally agreed-upon definition of terrorism, certain provisions of American law recognize that terrorism connotes attacks on civilians, which is not contemplated by the Overt Acts at issue here. *See, e.g.*, 22 U.S.C. § 2656f(d)(2) ("'terrorism' means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents"). Additionally, in the government's memorandum of law in support of its Motion in Limine No. 1, the government argues that the defendants should not be entitled to the protection of lawful combatant status, primarily because of the fact that the purported PIJ enterprise allegedly targets civilians, a position that is wholly consistent with Mr. Fariz's argument in the instant motion that attacks on military targets in occupied territory are not unlawful under international law. (Doc. 973 at 13-16.) Further, by highlighting the civilian nature of the targets and the fact that those targets are in Israel, not the occupied West Bank and

Even if the exercise of jurisdiction over these Overt Acts was reasonable, the nature of the incidents in question cannot serve as a basis for a conviction under Counts One and Two based on the actors and territory involved.

2. Applicability of Customary International Law in U.S. Courts

With respect to the applicability of international law in the United States, "[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 114; *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir. 1986) ("To the extent possible, courts must construe American law so as to avoid violations of public international law," which is part of the common law in the United States). While courts in the United States can uphold a statute that contradicts international law where there is a clear congressional or executive directive, treaty, or judicial decision, "courts will not blind themselves to violations of international law where legislative intent is ambiguous." *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (internal citations omitted); *Garcia-Mir*, 788 F.2d at 1453.

Here, there is no indication that Congress or the executive branch intended to allow for prosecutions regarding non-national individuals charged with killing foreign soldiers on foreign territory they occupy in contravention of international law. There is also no international treaty ratified by the United States or a judicial decision to this

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Gaza Strip, the government pointedly identifies those attacks it believes are illegal, as opposed to the alleged attacks identified here. (*Id.*)

effect.

In an absence of such precedent, courts look to the laws and practices of nations, as embodied by United Nations resolutions, and the opinions of learned scholars as evidence of what customary international law actually is in a given area. *United States v. Yousef*, 327 F.3d 56, 93-94 (2nd Cir. 2003). As explained more fully below, numerous United Nations resolutions and learned scholars have opined on the nature of Israel's occupation of the West Bank and Gaza Strip (and, from 1978 to 2000, southern Lebanon) and the violations of international law inherent in that occupation, and on the recognition of the Palestinians' right to resist that occupation. That right of resistance includes, under customary international law, the right to engage in armed struggle.

3. The Nature of the Israeli Presence in the West Bank and Gaza Strip

Overt Acts 124, 131, and 321 involve alleged PIJ attacks in the West Bank and Gaza Strip. It is undisputed that Israel has militarily occupied the West Bank and Gaza Strip since 1967, and does not exercise sovereignty over those territories. H.C. 2056/04, *Beit Sourik Village Council v. The Government of Israel* (June 30, 2004 Israeli Supreme Court)("Since 1967, Israel has been holding the areas of [the West Bank and Gaza Strip] in belligerent occupation") (Attached as Exhibit A). The United States recognizes the nature of the West Bank and Gaza Strip as occupied territory in, *e.g.*, the State Department's annual report on human rights, which refers to the area of "the West Bank,

Gaza Strip. . .and East Jerusalem" as the "Occupied Territories."[2] *See* DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2004, ISRAEL AND THE OCCUPIED TERRITORIES (February 2005) (Attached as Exhibit B). In the global arena, the United Nations Security Council, in noting that "the acquisition of territory by force is inadmissible," reaffirmed "the overriding necessity for ending the prolonged occupation of Arab territories occupied by Israel, including Jerusalem." S.C. Res. 35/476, U.N. SCOR, 35th Sess., 2242nd mtg., paras. 1 & 2, U.N. Doc. S/RES/477 (1980) (The Security Council also "[s]trongly deplor[ed] the continued refusal of Israel, the occupying Power, to comply with the relevant resolutions of the Security Council and General Assembly") (Attached as Exhibit C). More recently, the International Court of Justice has held, in the context of criticizing Israel's military occupation, that Israel's construction of a wall in the West Bank is a violation of the Palestinians' right to self-determination, and that Israeli settlements in the Occupied Territories have been established in violation of international law. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131, at §§ 120, 122 (July 9) (Attached as Exhibit D).

4. The Nature of the Israeli Presence in Southern Lebanon in 1992

Similarly, Overt Act 17 involves an alleged PIJ attack that took place in southern Lebanon, an area that Israel illegally held in belligerent military occupation until May

[2]Despite this recognition by the Executive Branch, the Superseding Indictment in this case misleadingly refers to the occupied West Bank and Gaza Strip as "the Territories." (Doc. 636 at 3.)

2000. Israel's numerous invasions and prolonged occupation of Lebanese territory from 1978 through 2000 made it the subject of several unanimous United Nations Security Council Resolutions, in which the United States voted to join, that demanded its immediate withdrawal from Lebanon. *See, e.g.,* S.C. Res. 33/425, U.N. SCOR, 33d Sess., 2074th mtg., para. 2, U.N. Doc. S/INF/34 (1978) ("*The Security Council*. . . [*c]alls upon* Israel to immediately cease its military action against Lebanese territorial integrity and withdraw forthwith its forces from all Lebanese territory") (Attached as Exhibit E); S.C. Res 37/509, U.N. SCOR, 37th Sess., 2375th mtg., para. 1, U.N. Doc S/RES/509 (1982) ("*The Security Council*. . . *[d]emands* that Israel withdraw all its military forces forthwith and unconditionally to the internationally recognized boundaries of Lebanon") (Attached as Exhibit F). Israel's actions in Lebanon even produced a rare censure from the United Nations Security Council. S.C. Res. 37/517, U.N. SCOR, 37th Sess., 2389th mtg., para. 3., U.N. Doc. S/RES/517 (1982) ("*The Security Council, [d]eeply shocked and alarmed* by the deplorable consequences of the Israeli invasion of Beirut on 3 August 1982. . .*[c]ensures* Israel for its failure to comply with" previous resolutions.) (Attached as Exhibit G). The only presence Israel maintained in occupied southern Lebanon at the time of the attack alleged in Overt Act 17 was military in nature. *See* DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 1993, LEBANON (January 1994) ("Israel exerts control in or near its self-proclaimed 'security zone' in southern Lebanon largely through the Army of South Lebanon (SLA) and the presence of about 1000 troops. The SLA maintains a separate and arbitrary system of justice in the zone,

without reference to central Lebanese authority") (Attached as Exhibit H).

5. Customary International Law on the Right to Resist

International law provides that the Overt Acts involving attacks on military targets cannot constitute "murder" for the purposes of federal or Florida law, and hence cannot form the basis of a conviction under Counts One and Two. Protocol I to the Geneva Conventions of 1977, which lays out a protection regime for the victims of international conflicts, states that its protections and restrictions apply to "peoples [who are] fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 1(4), 1125 U.N.T.S. 3, 16 I.L.M. 1331 [entered into force on December 7, 1978] (attached as Exhibit I) . Therefore, peoples like the Palestinians, who are engaged in a struggle against a foreign occupation in an attempt to exercise their right of self-determination, are entitled to all the protections of international humanitarian law, which treats them as combatants permitted to engage in clashes with foreign troops according to the laws of war.

While the United States has not ratified Protocol I,[3] over 160 countries have done so, a number that reinforces its status as an expression of customary international law.

[3]While the government recognizes this point in its memorandum of law in support of its Motion in Limine No. 1, it also cites Protocol I "as guidance on general principles of the laws and customs of war" and "telling indicators of the customary laws of war." (Doc. 973 at 14 n.10, 15.)

Several commentators have noted that Protocol I constitutes customary international law, and should be recognized as such by the United States. *See, e.g.*, Kenneth Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict," 98 Am. J. Int'l. L. 1, 11, 15-16 (Jan. 2004) ("Although thirty countries have not ratified Additional Protocol I, the targeting provisions are largely seen as reflective of customary international law"); Christopher Greenwood, "Customary Law Status of the 1977 Geneva Protocols," in Humanitarian Law of Armed Conflict: Challenges Ahead 96 (Delissen and Tanja, eds. 1991) (noting that it is generally assumed that multilateral treaties constitute an authoritative statement of customary international law).

In this regard, the General Assembly of the United Nations has explicitly and repeatedly affirmed the right of the Palestinian people to self-determination. *See, e.g.*, G.A. Res. 3236, U.N. GAOR, 29th Sess., 2296th plen. mtg., para. 1 (1974) (*"The General Assembly. . .[r]ecalling* its relevant resolutions which affirm the right of the Palestinian people to self-determination, 1. *[r]eaffirms* the inalienable rights of the Palestinian people in Palestine, including: (a) [t]he right to self-determination without external interference; (b) [t]he right to national independence and sovereignty") (Attached as Exhibit J). In fact, the General Assembly has recognized the "inalienable right" of the Palestinian people to "self-determination, national independence, territorial integrity, national unity and sovereignty without external interference" and the right to resist "colonial and foreign domination and foreign occupation by all available means, particularly armed struggle." G.A. Res. 33/24, U.N. GAOR, 33rd Sess., 63rd plen. mtg., paras. 2 & 3 (1978) (also

linking the struggle of the Palestinian people with that of South Africans against apartheid) (Attached as Exhibit K).

Legal scholars have also argued that the Palestinians specifically enjoy a right to resist the Israeli occupation due to the severity of its depredations. Richard A. Falk and Burns H. Weston, "The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada," 32 Harv. Int. L. J. 129, 151-52 (Winter 1991) ("[B]ecause Israel has failed over the years to respond adequately to complaints made on behalf of Palestinian rights - claims often validated by formal action by various organs of the United Nations - the nature of the occupation provides an underlying legal justification for a right of resistance against the Israeli authorities"); *see also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131 (July 9) (separate opinion of Judge Elaraby) (adopting the position taken by Falk and Weston and noting that "[o]ccupation, as an illegal and temporary situation, is at the heart of the problem") (Attached as Exhibit L); John Quigley, The Case for Palestine: An International Law Perspective 189-97 (2005) (discussing in detail the Palestinians' right to resist Israeli occupation and noting that such anti-colonial resistance has been specifically exempted by the United Nations from constituting illegal "aggression") (Attached as Exhibit M).[4]

[4]Additionally, as a corollary point, extradition law in the United States contemplates a "political offense" exception to extradition requests by foreign countries for individuals in the United States. *Barapind v. Enomoto*, 360 F.3d 1061, 1073-77 (9th Cir. 2004). For the exception to apply, the extraditee must show that his act took place in the context of a political uprising or upheaval and that the act itself was committed in furtherance of the uprising. *Id.* at 1074.

III. The Underlying Facts of the Overt Acts in Question

The Overt Acts at issue here all contain allegations of "murder" committed by the PIJ. The racketeering activity alleged in Count One of the Indictment includes "murder, in violation of Florida Statutes 782.04; 777.04(3)" and conspiracy to murder under 18 U.S.C. § 956. Under Florida law, murder is defined as "the unlawful killing of a human being." FLA. STAT. ch. 782.04 (2003). Count Two of the Indictment charges the Defendants with "Conspiracy to Kill, Main, or Injure Persons at Places Outside the United States" in violation of 18 U.S.C. § 956,[5] which proscribes the commission of "an act that would constitute the offense of murder." Under federal criminal law in the United States, murder is defined as "the unlawful killing of a human being with malice aforethought." 18 U.S.C. § 1111. The Overt Acts of occupied Palestinians acting against Israeli military targets in occupied territory are protected under customary international law. Accordingly, these Overt Acts, at a minimum, cannot constitute "murder" for the purposes of this Indictment, since they are not "unlawful killing."

Specifically, OA 17 alleges that "[o]n or about April 6, 1992, co-conspirators

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Among the factors to consider are "'the character of the foray, the mode of attack, the persons killed or captured, and the kind of property taken and destroyed.'" *Id.* (quoting *Ornelas v. Ruiz*, 161 U.S. 502, 511 (1896)). Case law discussing the political offense exception to extradition has focused strongly on whether or not the victims were civilians as a guide to gauging its applicability. *Id.* at 1075-76 (discussing cases). Individuals engaged in acts on military targets in territory held since 1967 in belligerent occupation by Israel, which has seen two large-scale uprisings in that time, or in an occupied sovereign would almost certainly not be extraditable upon a request by Israel in the United States.

[5]Only Overt Acts after April 1996 can serve as a basis for conviction under Count Two. As such, only Overt Act 321 is applicable. (Doc. 636 at 103.) All the other Overt Acts discussed here are applicable only as to Count One.

associated with the PIJ, including Nizar Mahmoud, Abdel Kamel Daher and Khaled Muhammed Hassan, murdered two people and injured approximately five others in a suicide attack near the town of Hula which was close to the border between Israel and Lebanon." The Superseding Indictment provides no further details about the individuals killed or wounded in the attack. While the Superseding Indictment is deliberately vague in alleging that the town of Hula is "close to the border between Israel and Lebanon," in reality Hula is located in the area of southern Lebanon that was occupied by Israel until 2000. A Hebrew-language newspaper article that was produced to Mr. Fariz by the government on February 7, 2005, clearly shows Hula's location and notes that the two individuals killed were military personnel. (See Bates # 133037.) As noted above, Israel's occupation of southern Lebanon was clearly in violation of international law, as evidenced by several U.N. Security Council Resolutions demanding an immediate withdrawal of Israeli forces and even one censuring Israel for its conduct in Lebanon. The U.S. Department of State has noted that the only personnel Israel deployed in southern Lebanon during its illegal occupation were military in nature. The location of the attack and the military personnel targeted do not rise to the level of an "unlawful" killing under Florida law, given that customary international law allows individuals under foreign military occupation the right to resist.

Overt Act 124 states: "On or about September 4, 1994, co-conspirators associated with the PIJ, murdered one person and injured several people in a shooting attack in the vicinity of Mirage Junction in or near the Gaza Strip in Israel." As mentioned above,

Israel has held the Gaza Strip, which is not a part of Israel, in belligerent occupation since June 1967. The Superseding Indictment does not devolve any further information about the individuals killed or wounded in the attack. What further discovery produced by the government reveals is that the attack actually took place in or near the settlement of Morag, which has been established in violation of international law, and that the individual killed was a soldier. (Bates # 130537.) The individual involved was an alleged PIJ associate who was conducting legitimate armed struggle against an illegal military occupation and, as such, was not engaged in an "unlawful" killing that would rise to the level of the predicate felony of murder under Florida law in Count One.

Overt Act 131 states: "On or about November 11, 1994, a co-conspirator associated with the PIJ murdered three people and wounded approximately eleven in a suicide bombing in the vicinity of Netzarim Junction, Gaza Strip." Again, the Superseding Indictment provides no further details about this incident. Upon information and belief, Netzarim is in fact an Israeli settlement in the Gaza Strip, established in violation of international law, and the three individuals killed were actually Israeli soldiers. Since such an act is not an unlawful killing, it cannot constitute the predicate felony of murder in violation of Florida law under Count One.

Overt Act 321 states: "On or about November 15, 2002, co-conspirators associated with the PIJ murdered twelve people and injured several others in a suicide shooting attack in the vicinity of Hebron in the West Bank." There are no further factual allegations about this incident in the Superseding Indictment. It does not reveal that

Hebron is a city of some 200,000 Palestinian under Israeli military occupation, in which certain homes and properties have been taken over by Israeli settlers. The most recent discovery by the government about this incident dates from April 12, 2005 - see Bates #s 130554 & 130560 - and in total reveals that the individuals killed were 9 Israeli military personnel and 3 armed paramilitary settlers from the "response team" of the illegal Israeli settlement of Kiryat Arba, which is located right next to Hebron.[6] This scenario cannot constitute an unlawful killing so as to rise to the level of the predicate felony of murder under Florida law. Further, such an act would simply not be "murder. . .if committed in the special maritime or territorial jurisdiction in the United States" in violation of 18 U.S.C. § 956. For example, if a foreign soldier or armed paramilitary were engaged in the belligerent occupation of any part of the United States, it would go without saying that our courts and legislature would not consider an American killing such an occupier to be an act of murder.

WHEREFORE, Defendant Hatem Naji Fariz respectfully requests that the Court preclude the admission into evidence of certain Overt Acts since they cannot form the basis for conviction under Counts One and Two of the Superseding Indictment.

[6]The government, in its memorandum of law in support of its Motion in Limine No. 1, mistakenly refers to the individuals killed in this incident as civilians, which is belied by the record in this case. (Doc. 973 at 14.)

Respectfully submitted,

R. FLETCHER PEACOCK
FEDERAL PUBLIC DEFENDER

/s/ Wadie E. Said

Wadie E. Said
Assistant Federal Public Defender
400 N. Tampa St., Suite 2700
Tampa, Florida 33602
Ph: 813-228-2715
Fax: 813-228-2562

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of April, 2005, a true and correct copy of the foregoing has been furnished by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Cherie L. Krigsman, Trial Attorney, U.S. Department of Justice; Alexis L. Collins, Assistant United States Attorney; William Moffitt and Linda Moreno, counsel for Sami Amin Al-Arian; Bruce Howie, counsel for Ghassan Ballut; and to Stephen N. Bernstein, counsel for Sameeh Hammoudeh.

/s/ Wadie E. Said
Wadie E. Said
Assistant Federal Public Defender